

2013 IL App (2d) 120317-U
No. 2-12-0317
Order filed March 19, 2013

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

H3 BUILDERS, INC.,)	Appeal from the Circuit Court
)	of Jo Daviess County.
Plaintiff and Citation Petitioner-)	
Appellant,)	
)	
v.)	No. 10 MR 145
)	
LCC VENTURE, MIKE SPROULE,)	
and DAN SPROULE.)	
)	Honorable
Defendants and Citation)	William A. Kelly,
Respondents-Appellees.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing, as time-barred, plaintiff's claim for fraudulent transfer (740 ILCS 160/5 (West 2010)) brought as part of post-judgment supplementary proceedings (735 ILCS 5/2-1402 (West 2010)), where there was evidence that plaintiff's counsel knew or should have known by May 2007 that defendants might have wrongfully disposed of assets, and plaintiff failed to file its fraudulent-transfer claim within one year of May 2007 (740 ILCS 160/10 (West 2010)).

¶ 2 Plaintiff, H3 Builders, Inc. (H3), appeals from the judgment of the trial court granting the motion of defendants, LLC Venture, Mike Sproule, and Dan Sproule, to dismiss plaintiff's

postjudgment motion for turnover as barred by the statute of limitations for fraudulent-transfer claims. For the following reasons, we affirm.

¶ 3

OVERVIEW

¶ 4 In September 2005, H3 brought suit against Venture and its sole owners, Mike and Dan Sproule. H3 alleged that Venture and the Sproules breached a contract to sell land to H3. On September 9, 2010, the trial court entered a default judgment against defendants. About a year later, on September 6, 2011, H3 filed a “motion for turnover” pursuant to section 2-1402(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1402(a) (West 2010)), which permits a judgment creditor “to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor ***, and of compelling the application of non-exempt assets or income discovered toward the payment of the amount due under the judgment.” H3 alleged that, in 2006, the Sproules had disposed of the assets of Venture and that the disposition constituted a fraudulent transfer under section 5(a)(1) of the Uniform Fraudulent Transfer Act (Act) (740 ILCS 160/5(a)(1) (West 2010)). Section 5(a)(1) provides:

“(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor ***.”

¶ 5 Defendants moved to dismiss the motion for turnover as barred by the statute of limitations for fraudulent transfer claims. Section 10(a) of the Act (740 ILCS 160/10(a) (West 2010)) provides that claims under section 5(a)(1) of the Act must be brought “within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was

or could reasonably have been discovered by the claimant.” The second clause of section 10(a) embodies the “discovery rule” that has been read as implied in statutes of limitations that have not stated it expressly. See *Gilbert Brothers, Inc. v. Gilbert*, 258 Ill. App. 3d 395, 399 (1993) (citing *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 414-15 (1981)).

¶ 6 After an evidentiary hearing, the trial court determined that, as early as February 2005, H3 was on notice of the possibility that the Sproules did or would fraudulently transfer Venture’s assets. H3, however, did not file its motion for turnover until September 2011. Accordingly, the court dismissed the motion for turnover as time-barred. H3 appeals from that judgment.

¶ 7 BACKGROUND

¶ 8 Beginning with H3’s September 2005 complaint, we recapitulate the evidence that bears on when H3 was on notice, under the “discovery rule” in section 10(a) of the Act, that the Sproules did or would fraudulently transfer Venture’s assets.

¶ 9 H3’s complaint (which was amended in June 2006) alleged that, in September 2004, it entered into an agreement to purchase from Venture a parcel of land located in the Scenic Meadows subdivision in Galena. The parcel was 10 acres, comprising 20 lots within Scenic Meadows. The total purchase price of \$512,600 was to be paid by installments as certain conditions were met: (1) \$250,000 “to be paid *** at the time of closing[,] which shall be as soon as is reasonably possible (not to exceed seven (7) days) after approval of the Galena City Council of the Phase III, Final Plat”; (2) \$106,300 “to be paid when all utilities (water and sewer) are completely installed, which said installation shall occur no later than April 1, 2005; (3) \$106,300 “to be paid when the storm sewer, curb[,] and gutter etc., are completely installed ***, which installation shall occur no later than July 1, 2005[,] as well as completion of the roadways through the parcel up to the installation of the first

coat of asphalt”; and (4) \$50,000, which “shall be paid when the last lift of asphalt on the road through said parcel is completed.”

¶ 10 H3 alleged that it had paid Venture \$362,600 pursuant to the contract, as Venture had installed the utilities, storm sewer, curb, and gutter. Subsequently, however, Galena determined that the curb and gutter did not comply with its code. H3 demanded that Venture remove and reinstall the curb and gutter, but Venture did not. Eventually, Venture “stopped doing business and [its] owners *** entered into a receivership arrangement.”

¶ 11 H3 brought two counts: count I alleged breach of contract, and count II alleged fraud. Count II specifically alleged that, when the Sproules entered into the contract on behalf of Venture, they had no intent to install the curb and gutter in compliance with Galena’s code.

¶ 12 In July and August 2006, the Sproules moved separately for dismissal of the complaint against them individually. Citing Illinois law on limited liability companies, they maintained that they were not personally liable for Venture’s debts. The motions were heard on April 12 and May 7, 2007. The arguments on the motions referenced the Sproules’ sale of Venture’s assets. On April 12, counsel for H3 remarked that Dan had sued Mike and that it was alleged in the suit that the Sproules “had sold [Venture].” H3's counsel also commented that Venture was “no longer in good standing with the Illinois Secretary of State’s office.” In response, counsel for the Sproules alluded to a sale of Venture’s assets to Shaukut Sindhu:

“I think some of the question is[:] was [Venture] in good standing at the time of the sale to Mr. Sindhu and his syndicate. I think that’s the question and, if so, then I think, appropriately, [the Sproules] should be dismissed.

I was unaware that [Venture] is no longer in good standing, Your Honor. I can tell you that in an effort to dissolve the assets that the Sproules had in other entities, we, in the last two weeks, sold an additional parcel of property[,] and I know that Mr. Sindhu is contractually obligated to buy a third property by July[,] but I was unaware that [Venture] is no longer in good standing.”

¶ 13 The lawsuit to which H3's counsel referred was, presumably, the February 2, 2007, action brought by Dan against Sindhu and Mike. During briefing in this case, defendants filed a motion to take judicial notice of the complaint in that February 2007 action. We granted the motion. Attached to the February 2007 complaint is a February 2006 contract by which Sindhu agreed to purchase (1) Dan and Mike's interests in Venture for \$10,000; (2) 154 acres in Scenic Meadows for \$2,500,000; and (3) two rock quarries or gravel pits for \$690,000 and \$400,000, respectively. The complaint alleged that the sale of the Scenic Meadows acreage closed on August 8, 2006. The complaint further alleged that Sindhu failed to close on the remaining sales within the time frame specified in the contract. Dan sought specific performance and money damages. (The complaint explains that Mike was joined as a defendant because he refused to join as a plaintiff.)

¶ 14 Returning to the lawsuit at hand, we note that, on May 7, 2007, counsel for the Sproules argued that they should be dismissed from the suit because they no longer owned Venture. H3's counsel replied that the Sproules could not, simply by selling Venture, evade responsibility for any wrongdoing:

“[P]art of the agreement was that [Venture] and its members would construct this roadway in exchange for payment by my client, [H3], and they purported to go in and put in some curb and gutter and a portion of the roadway without a permit from the City of Galena, without

plans that were approved by a registered engineer and then turned around and as they've advised the Court, purportedly sold [Venture] to a third party who subsequently, on the same day—with the sale, I guess[,] included the property because there was a deed that was also conveyed at or about the same time to all property purportedly owned by [Venture].

On the same day that the property was conveyed, which purportedly is the roadway in question and now a third party owns it (even though they've contracted to sell it to us); that third party conveyed it to another party. So there's [*sic*] two parties out there that purportedly have an interest in this real estate. And so when [*sic*] [the Sproules] do is, they say, well, we've sold this. Whatever compensation we got for it, we've distributed it out of the LLC; there's nothing in there. We don't have the property any more; we conveyed it out so, Mr. Plaintiff, you can't look to us because there's a statute that says we're not personally liable.

I acknowledge that that's what the statute says but I don't acknowledge that that gets them out as parties to this lawsuit. Admittedly, they're the only two members of [Venture], this limited liability company. Somebody has to respond to the orders of the Court regarding interrogatories, depositions. Somebody's got to order these people to do something and if they can evaporate into thin air just because they've sold it when they had a contractual commitment with my client, I don't think that's what the legislature intended.

I think they've got an obligation to us. *** They have a fiduciary obligation to [Venture]; one, not to improperly distribute funds from [Venture], and, two, if they're going to dispose of it in some way or fashion, you need to give notice to known creditors.

We're a known creditor. We had a lawsuit pending against them. If they want to get rid of us, give us notice, we'll institute our litigation in a manner that's appropriate under the statute, which we think we already have and we'll proceed[,] but they can't avoid their contractual responsibilities by evaporating into thin air and getting into a discussion like we're having with the Court this morning ***."

¶ 15 Counsel for the Sproules replied that the sale of Venture "was properly done" and that "actual notice" was given to H3. Counsel for H3 argued that the notice was not sufficient:

"Now [the Sproules] didn't dissolve [Venture] but they sold it and I think as a known creditor, we were entitled to notice and notice doesn't mean that you pick up the phone and you call somebody; it means that you give them something in writing because it triggers the running of the statute of limitations[,] and there's a five year statute of limitations on a known creditor of a dissolved LLC.

From this moment, we don't know that [Venture] is active. We know that the Secretary of State says they're not. I know that that can be reinstated but as of this moment, they're dissolved and if they want to dissolve this corporation, *** do it right.

Give notice, start the statute of limitations running against known creditors and take it from there[,] and if a creditor succeeds in getting a judgment against the LLC, the LLC, under this statute[,] can ask the Court to appoint a receiver to go in and see if there were improper distributions to its members[,] and I think that's what happened here[,] and I think Michael and Daniel Sproule are necessary parties to this litigation; personal liability aside, I think they're necessary parties."

¶ 16 The court then had this exchange with H3's counsel:

“THE COURT: When you say personal liability aside, they’re necessary parties; I guess we’re looking at a couple of different things. One is you have a claim here in your Amended Complaint for breach of contract.

MR. ROTH [H3’s counsel]: Yes.

THE COURT: And the statute would seem to state that the underlying individuals would not be liable for the actions of the LLC with regard to a contract[,] but you’re also alleging fraud with fraudulent misrepresentation.

MR. ROTH: Yes.

THE COURT: So the tort (the fraudulent misrepresentation), what about fraudulent conveyance, is that a claim that you’re going to pursue or—

MR. ROTH: I think that’s part of it, Judge. I think that’s part of it; I think that’s part of the fraud.

THE COURT: It seems to me that the statute would provide that there isn’t any liability for a contractual breach on the part of these individuals but you can pursue tort claims against people if you think they’ve breached some duty (made representations which have damaged your client).

MR. ROTH: I acknowledge that but I also think, Judge, that if you—you allow Michael and Daniel Sproule to be removed [as] parties to this lawsuit and allow them to convey the property, which is the subject matter of this lawsuit, to a third party when we have a contractual obligation with them, that’s their job. If they think that they’ve passed the responsibility onto somebody else then bring them in and they say I haven’t tried to contact them.

At one of the hearings that we had back in January, Michael Sproule [and his attorney] said ‘Here’s that name of the guy that we sold it to, you get in touch with him.’

I’ve tried five times. You can’t get in touch with these people. There’s no way you can do it and I don’t think they can avoid their contractual responsibilities by saying ‘that’s our problem’; that’s their problem.

THE COURT: Well, that may be true[,] but what vehicle are we using here to keep them in? The statute provides that for a contract breach, they’re out.

Now, if you want to pursue action against them individually [for] fraudulent conveyance, because that’s what it sounds like what you’re telling me, that that’s a fraudulent conveyance to some entity they sold, took the money and left, to the detriment of your client, maybe that’s—I mean, it sounds like you’re telling me that that’s what your clients are claiming took place plus this fraudulent misrepresentation that you’ve alleged in Count 2.

MR. ROTH: I think they’re involved because, for an example, I want to take their depositions. You’ve dismissed them as parties to this lawsuit. How do I compel them as the only people (as the members of this LLC) to comply with what I think are the requirements of the statute?

They’ve got to be involved at least to answer because they’re the only ones that know.”

The trial court ultimately granted the motion to dismiss count I (breach of contract) as to the Sproules. The court denied the motion with respect to count II (fraud).

¶ 17 On June 20, 2007, H3’s counsel remarked to the court that there was a possible settlement. In fact, the settlement discussions continued over the next three years as H3 tried to reach a

resolution with Venture's new owners. On August 14, 2008, the parties indicated that they were in discussions, but as yet had no agreement. H3's counsel remarked that the parties had not done any discovery in the case, but counsel did not believe that the case would need much "proof" at trial. The court continued the matter for a settlement conference.

¶ 18 On August 29, 2008, the parties announced that they had tentatively agreed to an arrangement whereby Galena would contribute money toward the improvements that Venture still had to perform under the contract. The court continued the case for a status hearing.

¶ 19 On November 18, 2008, the parties declared that they had agreed on a new arrangement: H3 would dismiss its suit if Venture simply conveyed clear title to the property. Some issues were outstanding, so the court continued the matter. Months more passed, and the new proposal never was adopted. On February 9, 2010, H3 filed a motion to enforce the August 29, 2008, settlement. After several months, during which the parties accused each of breaching the August 29 settlement, H3 stopped pursuing the motion to enforce and, instead, resumed negotiations with Venture and Galena. On April 8, 2010, Venture gave H3 permission to enter the property and finish the improvements. H3 began to seek estimates for the work from contractors. At a status hearing on May 11, 2010, counsel for Venture was allowed to withdraw; no new counsel was yet arranged. H3's counsel then informed the court that the latest estimate it received was substantially more than what H3 would have paid under the contract if Venture had completed the work. The trial court then asked whether Venture was "solvent." H3's counsel replied, "Or if not solvent, do we find any asset anywhere I guess is what we're going to have to find out in the next few months."

¶ 20 Following the May 11 hearing, the trial court entered an order requiring Venture to obtain new counsel, or file a supplemental appearance, by June 4, 2010.

¶ 21 At another status hearing on May 25, 2010, the court commented:

“I think the real problem here from what I can see is that if you’ve got—if [Venture] is judgment-proof, [then H3] is kind of stuck to maybe have to do what [H3's] got to do and try to chase it down.”

¶ 22 On September 9, 2010, H3 moved for a default judgment because Venture had not appeared in court since May 11 and had not obtained new counsel or filed a supplemental appearance by the deadline set by the court. H3 attached an affidavit estimating damages at \$1,560,144.57. The court entered a default judgment in that amount.

¶ 23 On November 8, 2010, H3 filed several citations to discover assets, and, on September 6, 2011, filed its motion for turnover. The motion named Mike, Dan, AND Sproule Construction Company (Sproule Construction) as respondents. The motion alleged that, in 2006, Venture sold property that constituted “all or substantially all of [Venture’s] remaining assets.” The entire proceeds of \$2,128,417.85 were “credited to the Hammer Simon & Jensen Escrow Trust Account for the benefit of [Sproule Construction].” Once in the escrow account, the proceeds “were used to pay non-[Venture] debts and obligations, and the net proceeds[,] if any[,] were disbursed to [Mike and Dan].” Attached to the motion were several documents.

(1) The 2006 partnership tax return for Venture, which showed

(a) the sale on August 1, 2006, of “land held for investment” at a price of \$2,550,000, with a resulting capital gain of \$1,070,425;

(b) (undated) distributions to Mike and Dan Sproule of \$617,156 each; and

(c) a capital balance of \$2,911,179 at the beginning of 2006 and a year-end balance of \$132,180.

(2) Closing documents for a sale of property described as “Scenic Meadows Subdivision,” where the seller was Venture, the buyer was “Rana Tauseef,” and the price was “2,520,000.” The documents also reflected a transfer of \$2,127,966.22 to “Hammer, Simon & Jensen Escrow Trust” on August 8, 2006.

(3) A balance sheet for the “2006 Sproule Construction - Hammer, Simon & Jensen Trust Account,” showing a deposit of \$2,127,966.22 from Venture on August 8, 2006.

(These dates are consistent with the February 2007 complaint brought by Dan against Mike and Sindhu, in which Dan alleged that the sale of 154 acres of Scenic Meadows to Sindhu closed on August 8, 2006.) As noted above (*supra* ¶ 4), the motion for turnover was filed under section 2-1402 of the Code and section 5(a)(1) of the Act.

¶ 24 The Sproules each filed motions to dismiss the motion for turnover on the ground that it was filed outside of the limitations period for claims under section 5(a)(1) of the Act. In response, H3 argued that the documents on which it relied for its fraudulent transfer claim “were not available and could not have been available to [it]” prior to the citation proceedings brought to enforce the September 2010 default judgment. H3 concluded that the motion for turnover, filed September 6, 2011, was brought “within one year after the transfer or obligation was or could reasonably have been discovered by [H3]” (740 ILCS 160/10(a) (West 2010)).

¶ 25 In their reply, the Sproules asserted that H3 “knew about the transaction,” *i.e.*, the sale of Venture’s land, “immediately upon its occurrence.” The Sproules attached a deed recorded August 9, 2006, as well as a letter from H3’s counsel to the Sproules’ counsel remarking that the August 9 deed had some defects.

¶ 26 The trial court held an evidentiary hearing on the limitations issue.

¶ 27 The first witness was Karl Malik, one of H3's owners. Malik testified that “his concerns of fraudulent behavior on behalf of the then-owners of [Venture, *i.e.*, Dan and Mike] dated all the way back to February of 2005.” Malik elaborated:

“From the day in January of 2005 when they were supposed to start on the road and they didn’t and when I saw the road (the way it was being built), that’s when I knew something was up.”

Malik stated that H3 sued Venture in 2005 because of the concerns about fraud. Malik claimed that, as soon as the suit was filed, he asked his attorney to place liens on Venture’s property. The attorney replied that “he was not able to do it.” Malik relied on that opinion, but his concerns about fraud continued throughout the lawsuit. Malik also testified that he discussed “lis pendens” with his attorney, but was not sure whether he did so before the property was sold to Tauseef.

¶ 28 Malik testified that, when he learned, probably in 2006, that the Sproules were “splitting up” as business partners, he became further concerned that the improvements to the property would not be completed on time. Malik, however, believed that Venture would remain “viable” because Sindhu intended to purchase it. Before Sindhu purchased Venture, Malik informed him that Venture still had work to do under the contract with H3. Sindhu assured Malik that the work would be done. Malik was not aware, when Sindhu purchased Venture’s land in August 2006, that the Sproules distributed the sale proceeds to themselves. Malik did not become aware of that transfer until November 2010, when his attorney received Venture’s 2006 tax return. Asked why he “wait[ed] so long to find out financial information about [Venture],” Malik replied that “[he] was told” that he “couldn’t go after” that information. Malik was unaware “[d]uring the pendency of the [underlying] litigation” that Venture did not have the funds to perform its obligations to H3 under the contract.

¶ 29 Patrick McCarthy was an accountant for Venture from 2000 to 2006. His firm prepared Venture's 2006 tax return, which McCarthy submitted, along with other documents, in response to a citation filed by H3. McCarthy interpreted the 2006 return to reflect (1) a sale of land for \$2,550,000; (2) a capital balance of \$2,911,179 at the start of 2006 but of only \$132,180 at the end; and (3) distributions to Mike and Dan of \$617,156 each. McCarthy noted that the 2006 return did not indicate which "specific person, firm or entity" received the distributions.

¶ 30 Dan testified that, in August 2006, Venture "sold the remainder of the land it owned" to Rana Tauseef. Dan clarified that Tauseef was "the same entity" as Sindhu. Dan stated that, when Venture made that sale, it did not retain any funds to finish the improvements on the property. Rather, "there [were] funds that [Karl Malik] held back for that, plus there was \$70,000 that [Galena] had committed towards that ***." According to Dan, Venture did not have \$1.5 million in assets at the end of 2006. (Dan did not testify as to what amount Venture *did* have.)

¶ 31 Dan was asked about Malik's testimony that (as paraphrased) he was "surprised that [Mike and Dan] received funds from [Venture] after the sale of the real estate to Mr. Sindhu." Dan commented, in reference to that testimony, that he had made it "very clear" to Malik and his business partner Fred Kuehl that Dan and Mike would no longer be doing business together as Venture. When Malik expressed concern about the work outstanding under the contract, Dan told him to speak to Sindhu. Dan recalled that Sindhu guaranteed Malik and Kuehl that the work would be finished.

¶ 32 Dan testified that, on September 29, 2005, a receiver was appointed by a court to oversee the dissolution and sale of Venture and Sproule Construction.

¶ 33 In their arguments at the close of the evidence, both parties identified the allegedly fraudulent transaction as the August 8, 2006, transfer of \$2.1 million from Venture to the escrow account for Sproule Construction. The motion for turnover was filed on September 6, 2011, and, hence, not “within 4 years after the transfer was made or the obligation was incurred” (740 ILCS 160/10(a) (West 2010)). Therefore, the fraudulent transfer claim would be timely only if was filed “within one year after the transfer or obligation was or could reasonably have been discovered by the claimant” (740 ILCS 160/10(a) (West 2010)).

¶ 34 The trial court held that fraudulent transfer claim was untimely:

“Mr. Malik said that as early as February of 2005, he was concerned about [Venture’s] ability to fulfill their obligations and so forth and this would be consistent with the lawsuit that was filed in that very year.

At that point, nothing further was done. The land wasn’t sold until 2006 and the interest in [Venture] sometime in 2007. There’s no *lis pendens* that was filed. There was no discovery done in the lawsuit.

The key thing here is Mr. Malik was aware that there were problems here. Now whether he knew—with any degree of specificity, but he was certainly—and he was right-on because he was concerned at that time up to the present time and so what I have here is Mr. Malik knew or should have known from the time of February, 2005, that there were some problems here and he never addressed any of those ***.” ***

* * *

I'm just taking his testimony that he was concerned back in February of 2005 with the viability of [Venture] to fulfill the obligations that it had to him. I believe that's what his testimony was.

Now he files a lawsuit in 2005 as a result of that (his concerns at that time) and then these transactions took place later. No *lis pendens*, no discovery that could have brought it [to] light; this was not a secret transaction in the sense that he didn't know there were some financial problems, contractual problems there and he took the action that he did take.

Now if he had a *lis pendens* there maybe that land transfer wouldn't have gone through and we'd have some assets here to be looking at to fulfill those obligations of [Venture]. It didn't happen."

The court dismissed the motion for turnover. H3 filed this timely appeal.

¶ 35

ANALYSIS

¶ 36 The Sproules did not label them as such, but their motions to dismiss the motion for turnover were enabled by section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2010)) which allows for the involuntary dismissal of an action on the ground that it "was not commenced within the time limited by law." The parties disagree over the standard of review. Where the trial court, following an evidentiary hearing, grants a section 2-619 motion to dismiss, we review the court's findings of fact under the manifest-weight standard but review *de novo* its determinations on questions of law. *Law Offices of Nye and Associates, Ltd. v. Boado*, 2012 IL App (2d) 110804, ¶ 12.

¶ 37 Another preliminary matter we address is H3's claim that we should not consider the discussions between the trial court and H3's counsel in the proceedings prior to the default judgment

in the underlying case. The Sproules rely significantly on those discussions in arguing that H3's counsel had well-grounded suspicions as of May 7, 2007, that the Sproules improperly disposed of assets, yet H3 failed to pursue a timely fraudulent-transfer claim. H3 asserts, first, that “if a transcript of proceedings is not filed and put before the trial court for consideration, it cannot be part of the record on appeal.” H3 cites *State Farm Mutual Automobile Insurance Co. v. Stuckey*, 112 Ill. App. 3d 647, 649-50 (1983), where we denied a motion under Supreme Court Rule 329 (Ill. S. Ct. R. 329 (eff. July 1, 1982)) to supplement the record on appeal with the transcript of an arbitration proceeding, where the transcript was never presented to the trial court. We explained that “documents which are not a part of the trial court record and were not considered by the trial court will not be considered on appeal.” *Id.* at 649.

¶ 38 *Stuckey* is inapposite. The motion for turnover here was filed under the same case number as the original action, and was considered by the same judge who presided over the original action. The Sproules were not required to supply the court a transcript of the earlier proceedings, but could assume that the court was acquainted with them.

¶ 39 Second, H3 argues that the Sproules have forfeited their reliance on those earlier proceedings because they did not refer to them in their motions to dismiss or at the evidentiary hearing. H3 is mistaken. A reviewing court “may affirm a trial court's judgment on any grounds which the record supports even if those grounds were not argued by the parties.” *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74.

¶ 40 H3 further states that, in any event, the statements its counsel made earlier in the underlying proceedings below were “nothing more than speculative.” H3 does not elaborate. We disagree with its assessment, and will explain after we set forth the governing law.

¶ 41 The parties evidently agree that, while the motion for turnover was brought as part of a supplemental proceeding under section 2-1402 of the Code, the fraudulent transfer claim alleged in the motion was governed by the statute of limitations for fraudulent transfer claims, namely section 10 of the Act. See *Workforce Solutions v. Urban Services of America*, 2012 IL App (1st) 111410, ¶¶ 47-49 (applying section 10 to fraudulent transfer claim brought in a section 2-1402 supplementary proceeding). Under section 5(a) of the Act, either a “transfer made” or an “obligation incurred” by the debtor can constitute a fraudulent transfer. 740 ILCS 160/5(a) (West 2010). H3's motion for turnover concerned a “transfer made” by the Sproules, specifically, the August 8, 2006, transfer, into their escrow account, of the proceeds from the sale of Venture property. Under section 10(a), H3 had to file its fraudulent transfer claim, if not within four years of the August 8, 2006, transfer, then at least one year after the transfer “was or could reasonably have been discovered” by H3. 740 ILCS 160/10(a) (West 2010). Since H3 filed its fraudulent transfer claim on September 6, 2011, well beyond the four-year window, H3 had to rely on the second clause of section 10(a), under which its claim was untimely if it was not brought within one year after the April 8, 2006, transfer was or could reasonably have been discovered by H3.

¶ 42 In *Gilbert Brothers*, the appellate court applied to section 10(a) the exposition of the “discovery rule” in prior cases. “[T]he effect of the discovery rule is to postpone the starting of the statute of limitations until a party knew or should have known of his injury.” 258 Ill. App. 3d at 399 (citing *Knox College*, 88 Ill. 2d at 414). As the supreme court in *Knox College* encapsulated the rule:

“At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable

conduct is involved. At that point, under the discovery rule, the running of the limitations period commences.” *Knox College*, 88 Ill. 2d at 416.

As the *Gilbert* court elaborated:

“[T]he event which triggers the running of the statute of limitations is not the first knowledge the injured person has of his injury, and, at the other extreme, is not the acquisition of the knowledge that one has a cause of action against another; rather, the statute starts to run when a person knows or reasonably should know of his injury and that it was wrongfully caused.” *Id.* (citing *Knox College*, 88 Ill. 2d at 415).

A party knows or reasonably should know of his injury and that it was “wrongfully caused” when the party has “(1) sufficient information that its injury was caused by the actions of another and (2) sufficient information to ‘spark inquiry in a reasonable person as to whether the conduct of the party who caused [the] injury might be legally actionable.’ ” *Workforce Solutions*, 2012 IL App (1st) 111410, ¶ 52 (quoting *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 22). “As to the second element, the injured party must have more than a mere suspicion that wrongdoing might have occurred in order to trigger the limitations period.” *Id.* “[R]easonable knowledge of wrongful cause requires more than a mere suspicion that wrongdoing might have occurred, if that suspicion is not yet supported by facts known to plaintiff.” *Mitsias*, 2011 IL App (1st) 101126, ¶ 24.

“[W]hether a party possessed the requisite constructive knowledge contemplates an objective analysis of the factual circumstances involved in the case. Thus, the relevant determination rests on what a reasonable person should have known under the circumstances, and not on what the particular party specifically suspected. The trier of fact must examine the factual circumstances upon which the suspicions are predicated and determine if they would lead a

reasonable person to believe that wrongful conduct was involved.” *Young v. McKiegue*, 303 Ill. App. 3d 380, 390 (1999).

Notably, in a given case the limitations period under section 10(a) of the Act might begin to run before judgment in the underlying action occurs. Accordingly, a party can bring an action under the Act during the pendency of the underlying lawsuit, and indeed may take a considerable risk if it waits until judgment. See *Levy v. Markal Sales Corp.*, 311 Ill. App. 3d 552, 557 (2000).

¶ 43 There are few Illinois cases applying section 10(a) of the Act. The most illustrative, and most analogous to the facts at hand, is *Salisbury v. Masjesky*, 352 Ill. App. 3d 1188 (2004), decided by the Third District Appellate Court. In 1996, Harold Salisbury obtained a judgment for \$85,000 on his complaint against Robert Majesky for an intentional battery that occurred on March 9, 1996. On June 21 and November 19, 2002, Harold filed complaints alleging fraudulent transfers between Robert and his wife Mary Lou. The first transfer Harold challenged was Robert’s transfer of his interest in the marital home to Mary Lou on August 30, 1996. The second was Robert’s transfer of three certificates of deposit (CDs) to Mary Lou. The transfers of the CDs “all occurred between 1996 and April of 1998.” *Id.* at 1188. As Harold’s 2002 complaints were not filed within four years of any of these transfers, the appellate court turned to consider whether the actions were timely under the “discovery rule.” The court determined that Harold was on notice of potential wrongdoing as of April 8, 1998, the date of his discovery deposition of Robert. At the deposition, Robert admitted that he had transferred title in the marital residence to his wife sometime after March 9, 1996. *Id.* at 1191-92. Robert was also asked about activity in his financial accounts. The appellate court quoted the following exchange:

“ ‘Q. Can you tell me whether there were transfers of money in the various accounts that may have existed at the Bank of Pontiac shortly after the March of 1996 incident?

A. [I] transfer money all the time, sir.

Q. Specifically in regard, though, to potential exposure and liability arising from the March 9, 1996, incident?

A. I pass money all the time, sir, taking care of my personal business.’ ” *Id.* at 1192.

¶ 44 This testimony, the court concluded,

“clearly shows that as of April of 1998,¹ Harold was both suspicious of the defendants’ financial activity and on notice that those suspicions were potentially justified. At that point, Harold ‘should have reasonably known, at the very least, that a possible cause of action may have existed for fraudulent transfer *** and [he] should have investigated further.’ ” *Id.* (quoting *Gilbert Brothers*, 258 Ill. App. 3d at 400).

¶ 45 In *Salisbury*, the appellate court found facts to support Harold, the judgment-creditor’s, suspicions (as voiced through his attorney) regarding Robert’s transfers of assets. Robert’s transfer of his interest in the marital residence was suspect both because of its timing (occurring subsequent to the battery and during the pendency of the consequent suit) and because the recipient was Robert’s wife, an “insider” (see 740 ILCS 160/5(b)(1) (West 2010) (“In determining actual intent [to defraud] *** consideration may be given, among other factors, to whether *** the transfer or obligation was to an insider”). Robert’s testimony about his account activity was suspect both because it was

¹This was, presumably, a typographical error; the court meant April of 1999, when the deposition occurred.

evasive and because he had admitted to another dubious transfer (his interest in the marital residence).

¶ 46 Here, as early as the May 7, 2007, hearing on the Sproules' motions to dismiss, H3's counsel voiced concerns over the Sproules' disposition of Venture's assets. See *Segal v. Illinois Department of Insurance*, 404 Ill. App. 3d 998, 1002 (2010) (an attorney's knowledge is imputed to the client). At the May 2007 hearing, the parties discussed whether the Sproules' argument should be dismissed as defendants because they no longer owed Venture. H3's counsel noted that, apparently, the Sproules had sold all of Venture's property, including the property that was the subject of the contract. Counsel went on:

“[The Sproules] say, well, we've sold this. *Whatever compensation we got for it, we've distributed it out of the LCC; there's nothing in there.* We don't have the property any more; we conveyed it out so, Mr. Plaintiff, you can't look to us because there's a statute that says we're not personally liable.” (Emphasis added.)

Counsel alleged here essentially what H3 would allege over four years later in its motion for turnover: the Sproules sold the land that was the subject of the contract, the proceeds of which were distributed out of Venture, leaving (essentially) “nothing in there.”

¶ 47 Shortly later in the hearing, H3's counsel again voiced suspicions about the Sproules' handling of Venture's assets. Counsel complained that the Sproules were attempting to circumvent the procedures for dissolving a partnership:

“[If] they [the Sproules] want to dissolve this corporation, *** do it right.

Give notice, start the statute of limitations running against known creditors and take it from there[,] and if a creditor succeeds in getting a judgment against the LLC, the LLC,

under this statute[,] can ask the Court to appoint a receiver to go in and see if there were improper distributions to its members[,] *and I think that's what happened here*[,] and I think Michael and Daniel Sproule are necessary parties to this litigation; personal liability aside, I think they're necessary parties." (Emphasis added.)

Here counsel suggested that the Sproules made improper distributions to themselves. The trial court, observing that count II of H3's complaint alleged "fraud with fraudulent misrepresentation," asked whether "fraudulent conveyance" was a "claim that [H3 was] going to pursue." Counsel for H3 responded, "I think that's part of it, Judge. I think that's part of it; I think that's part of the fraud." Later, the court again observed that counsel seemed to be asserting in his remarks that there was "a fraudulent conveyance to some entity [the Sproules] sold, took the money and left." H3's counsel did not take issue with this characterization.

¶ 48 Thus, the proceedings of May 7, 2007, indicate that H3's counsel was suspicious about the Sproules' disposition of Venture's assets. First, counsel remarked that the Sproules' response to the motion to dismiss was to assert that, after they sold the property, they distributed the proceeds to themselves and there was "nothing" left. Second, counsel suggested that there were "improper distributions" to Venture's members. Third, counsel expressly agreed with the trial court's assessment that counsel appeared to be alleging conduct by the Sproules that would constitute a "fraudulent conveyance." Fourth, when the court again characterized counsel's assertions as such, counsel did not dispute it, consistent with its prior express approval of the same characterization.

¶ 49 Not only was counsel for H3 in fact suspicious, but that suspicion was "supported by facts known" to counsel (*Mitsias*, 2011 IL App. (1st) 101126, ¶ 24). That there was "nothing" left in Venture as of May 2007 is consistent with facts that became of record during the section 2-1402

proceedings. First, Dan testified at the hearing on the motion for turnover that proceedings to dissolve Venture began in 2005. Second, documents turned over during the section 2-1402 proceedings revealed that, in August 2006, the Sproules sold the land that was the subject of the contract, took total distributions of over \$1 million, and left \$132,000 in assets at year's end. A reasonable person with counsel's knowledge as of May 2007 would have, or reasonably should have, known that H3 was injured and that its injury was wrongfully caused by defendants. See *Workforce Solutions*, 2012 IL App (1st) 111410, ¶ 52. Counsel had sufficient information to trigger in a reasonable person an inquiry into whether the Sproules' conduct was actionable. We conclude that the limitation period under section 10(a) began to run in May 2007 at the latest.

¶ 50 We note that H3's counsel expressed concerns again on May 11, 2010, when the court asked whether Venture was "solvent," to which counsel replied, "Or if not solvent, do we find any asset anywhere I guess is what we're going to have to find out in the next few months." Counsel thus expressed some skepticism about finding "any asset anywhere." Two weeks later, on May 25, the trial court commented that the "real problem" was whether Venture was "judgment-proof," in which case H3 would be "stuck" attempting to "chase *** down" assets. Even at this point, H3 made no claim for fraudulent transfer.

¶ 51 The trial court, we acknowledge, determined that the limitation period under section 10(a) of the Act began to run in January or February of 2005, which was when Malik, as he admitted, began to suspect fraud on the part of Venture because it was not performing its contractual obligations. The court, however, identified no facts known to Malik, other than Venture's failure to perform as agreed, that would put a reasonable person on notice that Venture did or would fraudulently dispose of its assets. (In fact, the transfer at issue did not take place until 2006.) In any

case, we need not decide whether the limitations period began in January or February 2005, as there is abundant evidence that the period began in May 2007. Since H3 did not file its fraudulent transfer claim within one year of May 2007, it is barred under section 10(a) of the Act.

¶ 52 H3 argues that it had no right, in the underlying lawsuit, to discovery relating to Venture's financial status, and could not have been expected to inquire into the possibility of a fraudulent transfer until post-judgment supplementary proceedings under section 2-1402 of the Code. As to the scope of discovery available to it, H3 states:

“There was a fraud count that was dismissed during the pleadings stages. Under the breach of contract claim in the complaint in this matter, the relevant issues related solely to performance of the contract by [Venture]. The performance of the contract has nothing to do with the financial affairs of the performing company in the period of time that follows its performance. *** [H3] had no right in the underlying action to discover the accounting records of [Venture] as those records had nothing to do with whether or not, prior to the filing of the complaint and prior to [the] transactions in question here taking place, [Venture] breached its performance obligations.”

¶ 53 H3 overlooks that the fraud count was dismissed as to the Sproules but retained as to Venture. We acknowledge, though, that the specific fraud alleged in that count was the Sproules' knowingly false representation, during contract negotiations, that they would install curbs and gutters in accord with Galena's specifications. There was no allegation that Venture misrepresented its financial ability to perform under the contract or impaired that ability by disposing of assets. In this connection, defendants cite *Manns v. Briell*, 349 Ill. App. 3d 358 (2004), a personal injury suit. In *Manns*, the appellate court held that the plaintiff had no right to pretrial discovery regarding the

defendant's financial condition. The plaintiff wanted to know, for purposes of potential settlement, whether the defendant had assets to satisfy a judgment in excess of his liability insurance limits. *Id.* at 362. Citing supreme court precedent, the court held that, in a tort action in which the plaintiff seeks compensatory not punitive damages, the defendant's liability insurance is discoverable, but not his financial condition. *Id.* at 365.

¶ 54 H3 assumes that it could not have brought a claim for fraudulent transfer while the underlying action was pending and then become entitled to discovery pertinent to *that* claim. We have determined that H3 should have brought a fraudulent transfer action within one year of May 7, 2007. Obviously, this implies that H3 *could have* brought such a claim within that time frame. See *Levy*, 311 Ill. App. 3d at 557. In fact, it is far from clear that H3's counsel believed, as of May 2007, that any (further)² discovery was necessary to confirm his conviction that the Sproules improperly disposed of the proceeds of the sale to Sindhu. Counsel asserted that, following the sale to Sindhu, distributions were made that left "nothing" in Venture. Moreover, counsel wanted a receiver appointed to determine whether the Sproules made "improper distributions" to themselves, as counsel believed "that's what happened here." Counsel then asserted to the trial court that "fraudulent conveyance" was "part" of the "fraud" counsel believed was perpetrated by the Sproules. H3 could, without incurring sanction, file a fraudulent-transfer claim before having all facts necessary to prove the claim. See *Yuretich v. Sole*, 259 Ill. App. 3d 311, 316-17(1993).

¶ 55 H3 takes issue as well with the trial court's observation that H3 could have filed a *lis pendens*. We do not address that issue, as it is unnecessary to our analysis.

²We say "further" because we do not know what, if any, documents were provided H3 by defendants before the May 2007 hearing.

¶ 56 We conclude that the trial court's determination that H3's motion for turnover was time-barred was not against the manifest weight of the evidence.

¶ 57 **CONCLUSION**

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court of Jo Daviess County dismissing H3's motion for turnover.

¶ 59 Affirmed.